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**In the Court of Claims of the United States.**

**INDIAN DEPREDACTIONS.**

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HIRAM H. STONE AND DANIEL E. Rouse, partners, <i>vs.</i>	}	No. 2811.
THE UNITED STATES AND THE NEZ Percé tribe, band, or nation of In- dians.		

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**DEFENDANTS' REQUEST FOR FINDINGS OF FACT. OBJECTIONS TO  
FINDINGS OF FACT REQUESTED BY CLAIMANTS. BRIEF AND  
ARGUMENT OF COUNSEL FOR DEFENSE.**

L. W. COLBY,  
*Assistant Attorney-General.*

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### DEFENDANTS' REQUEST FOR FINDINGS OF FACT AND OBJECTIONS TO FINDINGS OF FACT REQUESTED BY CLAIMANTS.

#### I.

Counsel for defendants objects to each and every one of the findings of fact requested by claimants, excepting the first.

#### II.

The defendants, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of the case in the findings of fact, request the court to find the same as follows :

1. The evidence does not show that members of the defendant Nez Percé band, tribe, or nation of Indians committed the depredation charged.

2. The evidence does not show that the defendant band or tribe of Indians were at the time of the depredation charged in amity with the United States.

3. That Joseph's band of nontreaty Nez Percés Indians, by the members of which said depredation charged was committed, if at all, were not in amity with the United States at the time of said depredation, but were in open hostility and at war.

4. The evidence does not show that the aggregate value of the property charged to have been taken by the defendant Indians exceeds the sum of \$3,000.

5. The evidence shows that a large portion of the property taken or destroyed did not belong to the firm of Stone & Rouse.

#### CONCLUSIONS OF LAW.

1. The Indian defendants in this case not having been in amity with the United States at the time of the commission of the depredation complained of, on September 13, 1877, the Court of Claims has no jurisdiction to render judgment for claimants.

2. The claimants, Stone & Rouse, can not in this action recover as partners for property belonging to them as individuals, nor for property belonging to members of their family or to other persons.

3. The petition of claimants should be dismissed.

L. W. COLBY,

*Assistant Attorney-General.*

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## BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANTS.

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### STATEMENT OF CASE.

This case originated by the filing of a memorial by claimants on the 18th day of March, 1878, in the Interior Department, asking payment of \$15,987.85 for losses caused by depredations alleged to have been committed by Nez Percés Indians on the 13th day of September, 1877, at a place called Clark's Forks Bottom, on the Yellowstone River, in the then Territory, now State, of Montana.

In support of this claim, in addition to the memorial, there were filed the *ex parte* affidavits of Thomas Shirley,

Zadock H. Daniels, Mat. Black, Alfred Wolverton, John S. Mendenhall, William L. Perkins, William H. Tracy, Howard Stone, and Edwin L. Fridley. This claim was examined, approved, and allowed December 23, 1886, by the Secretary of the Interior in the sum of \$3,345, and so reported to Congress, as required under the act of March 3, 1885. Since that time claimants have brought the case into this court by petition, filed June 25, 1891, under the law of March 3, 1891, and the depositions of Madison Black, Hiram H. Stone, Edwin L. Fridley, Daniel E. Rouse, Howard Stone, and William H. Randall have been taken at Bozeman, Mont., both plaintiffs and defendants being represented by counsel; all of which appears from the printed evidence herein.

On the part of the defendants there was taken the deposition of William McKenzie before Frank A. Branagan, at Washington, D. C., on the 9th day of February, 1893, which evidence has not been printed. The original deposition is on file in this court, and it will be referred to in this brief by quotation of such portions thereof as defendants deem material to a due presentation of the case.

It now comes before the court for a general review of all the testimony and facts, and for final adjudication, claimants having elected to reopen under section 4 of the law of 1891, and try the same before the court.

#### AMITY.

The court having already decided that it is necessary that amity exist between the Government of the United States and the Indians charged with the depredation at

the time of its commission, we deem it unnecessary to enter into any general discussion of amity and shall be content with calling the attention of the court to the evidence of an actual state of war existing at the time of the commission of the depredations charged, and showing that the depredations charged were committed during a battle between the Nez Percé Indians and Government troops, under command of Gen. Howard, of the U. S. Army. The court is respectfully referred to the report of Brig. Gen. O. O. Howard for a general history of what is known as the Nez Percé Indian war, to be found in Executive Documents, second session Forty-fifth Congress, 1877-'78, Vol. II, commencing on page 585 and ending on page 660, both pages inclusive; also the map of the campaign accompanying said report; also for said report see report of the Secretary of War for the year 1877, Vol. I, p. 589 *et seq.*

Defendants will content themselves in this case with making extracts from the valuable report of the eminent soldier above referred to, and should there be the least doubt in the minds of the court as to there having been a state of actual war existing at the time of the commission of the depredation charged, we ask the court to review the whole report, also the report of the Commissioner of Indian Affairs found on pages 10 and 11 of his report for the year 1877, and report of the agent in charge of Nez Percé Indians found on page 81 of the report of the Commissioner of Indian Affairs for 1877, before deciding in this matter. The extracts deemed necessary to be referred to herein are printed as a supplement to this brief, and referred to herein by the pages thereof.



These reports, when taken in connection with the evidence in this case found on pages 2, 6, 11, 14, 16, 18, 20, 51, 52, and 62 of the claimants' printed evidence, confirm in effect the following facts :

By treaty of June, 1855, Joseph's band of Nez Percés Indians were given, as Indian lands, the Wallowa Valley in Idaho. Upon the discovery of gold in the valley in 1860, the reservation was soon overrun by white settlers, and an agreement was made allowing them, the whites, to settle there ; but this agreement was not confirmed by Congress. In defiance of law, a town site was laid out in 1861, on the reservation and a population of 1,200 sprung into existence.

In 1863 a treaty was made by a part of the Nez Percés Indians whereby the reservation was greatly reduced. On account of these negotiations the Nez Percé tribe became permanently divided into two well-defined bands, one known as the treaty of peace or treaty Nez Percés, and the other nontreaty Nez Percés, or war party, the latter being under the leadership of Chief Joseph, and whose band of Nez Percés the evidence in this case shows committed the depredation complained of. Chief Joseph and his band utterly ignored the treaty of 1863, and continued to claim the Wallowa Valley, where he was permitted to remain until the Government, by reason of the encroachment of the whites upon the valley, was induced to take definite action with regard to the nontreaty Nez Percés, and a commission was appointed to treat with Joseph and his band and other nontreaty Indians. The commission stated the cause of the trouble to be *encroachments of the whites upon the Indians' farm lands, their fishing, and hunt-*

*ing ground*, as well as the actual settlement of four white men within the limits of the reservation, in violation of treaty stipulations.

On the 16th of June, 1873, the President of the United States, virtually recognizing the independence of Joseph's band, declared the Wallowa Valley a reservation for the nontreaty Nez Percés, as long as they remained peaceable. This order was revoked by the President June 10, 1875, not because of any fault on part of the Indians, but to satisfy the white emigrants who demanded the lands. Owing to imminent danger of a conflict between Chief Joseph's band and the settlers, growing out of the murder by the whites of one of Chief Joseph's band of Indians, a commission was appointed in 1876 consisting of D. H. Jerome, esq., Brigadier-General O. O. Howard, Major H. Clay Wood, and others. This commission recommended among other things the speedy military occupation of the Wallowa Valley by a force adequate to suppress any outbreaks. In pursuance of these recommendations, General Howard took full military control of the Wallowa Valley.

On the 14th of June, 1877, open hostilities broke out on White Bird Creek near Mount Idaho, and on the 17th of June, 1877, the first attack was made by Capt. Perry, under Gen. Howard's command, at Cannon, or Hangman's Creek, near Spokane, in Montana, in which battle the United States troops lost thirty-four men. On the 4th of July, 1877, the attack was renewed against Chief Joseph and his band near Cottonwood, on the Salmon River, and thirteen men were lost. The next battle was under

the immediate command of General Howard, on July 12, near the mouth of Cottonwood Creek, and eleven men were killed. The Indians under the leadership of Chief Joseph continued to flee and the Government troops and citizens pursued, the Government troops attacking and the Indians repelling their assaults as often as the troops came up with them.

On September 13, 1877, Col. Sturgis engaged in a battle with Chief Joseph and his band on Cannon Creek, Clarks Fork, near the Yellowstone, in which but few white men were killed and wounded, but the Indians lost heavily, in men and ponies. This is the battle referred to by Lieut. Fuller in his evidence found on printed page 16 of claimant's evidence, and also the one referred to by claimant Rouse in his evidence found on printed page 62, in which he says :

We were driven into the brush early in the morning when the Indians burned up these two ranches, and we heard a good deal of firing, and we did not understand it, and did not know where it came from. Did not know General Howard was in the country after the Indians. We did not learn that fact, but we could hear firing and shooting, but did not know that he had a battle with them, over about two or three miles from my ranch. We remained there in the brush during the whole of that day, and the firing continued, and we could see the Indians right around.

This is the battle described in Gen. Howard's report, on page 38, defendants' printed evidence, in which he says :

Our advance, consisting of Sturgis's cavalry and a detachment under Sanford, Otis's battery, and com-



pany of scouts, under my aid-de-camp, Fletcher, by a forced march of 85 miles in two days, overtook hostile Nez Perces on the 13th instant (September, the date of depredation); are having a running fight with them for over 20 miles.

During the running fight, or while the battle between the United States troops and Chief Joseph's band of Nez Perce Indians was actually in progress, whatever depredations the Nez Perce Indians were guilty of against the property of claimants herein were committed.

We deem it unnecessary to pursue the reports and evidence referred to in relation to this war further herein; suffice it to say that the United States troops pursued the Indians until the surrender to Col. Miles near Bearpaw Mountain, in October, 1877, of Chief Joseph and his band, after having been pursued by United States troops with whom he had frequent battles, one of which was at claimants' ranch, from Lolo Trail in Idaho, over 1,300 miles to the place of surrender.

The Commissioner of Indian Affairs in speaking of this capture says:

Upon the capture of Joseph and his Indians the first question that arises is, "What shall be done with them?" Humanity prompts us to send them back and place them on the Nez Perce Reservation, as Joseph and his followers have shown themselves to be brave men and skillful soldiers, who, with one exception, have observed the rules of civilized warfare, and have not mutilated their dead enemies. (Report of Commissioner of Indian Affairs, 1877, p. 13.)

In speaking of this Indian war, John B. Monteeth, United States Indian agent of the Nez Perce Indians, says :

As soon as the war broke out, the Indians living on the reservation, with but very few exceptions, and those living outside, immediately took sides with the whites and rendered valuable assistance to the army as scouts, carriers of dispatches, keeping the different commands informed as to the movements of the hostiles, and in furnishing horses. The exceptions referred to above were nontreaty Indians. I do not know of a single Christian Indian having left his home and joined the hostiles.

The judgment sought in this case is to be, if at all, against the very Indians who fought and furnished supplies and information to the Government forces in their war with the nontreaty Nez Perces, who have no treaty fund and are under no contract with the Government as a tribe, band, or nation. Claimants may contend that to decide that the Nez Perce Indians committing the depredation complained of were not at the time of its commission in amity defeats the payment of a just claim for losses actually sustained, but an examination of the statute under which claimants bring this action will soon convince any one to the contrary.

By section 1 of the act of March 3, 1891, Congress invested this court with jurisdiction of "all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation *in amity* with the United States." As to claims for depredations committed by Indians not in amity with the United States

and nontreaty Indians, as Joseph's band of Nez Perces were, Congress retained its jurisdiction to pass upon the justness of claimants' claims and appropriate for the payment of any and all losses claimants sustained, in the judgment of Congress, thereby working no hardship to claimants, only compelling them to proceed under another jurisdiction than the Court of Claims, the jurisdiction under which they have been authorized to proceed ever since the depredation is alleged to have been committed. Should Congress see that the facts should be found by the Court of Claims they are authorized to refer the case to the court for that purpose, and claimant loses none of his rights by this court deciding, as it has done heretofore, that it has jurisdiction only in cases of citizens brought against bands, tribes, or nations of Indians in amity with the United States. True, this case has been acted upon by the Interior Department, and an award of \$3,345 found in claimants' behalf, but claimants, having elected to reopen the case and try the same before the court, and new evidence having been taken on behalf of claimants and defendants, the case is now to be tried *de novo*, with the burden of proof upon the claimants.

#### PARTNERSHIP PROPERTY.

In his deposition, taken September 23, 1892, one of the claimants, Hiram H. Stone, testifies (see pp. 49, 50, 51, and 52, claimants' evidence) that a large amount of the property sued for in this proceeding was not partnership property, but, on the contrary, belonged to claimants and

the different members of their families individually. This being true, no recovery can be had in this case brought by Stone & Rouse as partners for that portion which is not partnership property. This would leave involved, then, in this case only such items as are shown to have been bought by the firm or members thereof with company funds.

#### VALUATIONS.

As to the value of the houses mentioned in claimants' petition, we respectfully call the court's attention to the evidence of claimant, Hiram H. Stone, found on pages 47, 48, and 49 of the printed evidence, for a particular description of these houses, if they may be called such. We also call the attention of this court to the evidence of William McKenzie, whose original deposition is on file in this case, but has not been printed in the evidence (see p. 2 of said evidence). According to the evidence of this witness, \$1,000 would be more than the value of these houses. The evidence is corroborated by the evidence found on page 15 of claimants' printed evidence, and is, we think, fully borne out by the description of the houses given by Claimant Stone, above referred to.

As to the value of the hay, and of the various small items mentioned in claimants' petition and evidence, defendants deem it unnecessary to make other mention than to say claimants' evidence does not in our judgment justify the values placed on claimants' property mentioned by them in their petition herein.



## CONCLUSION.

Claimants are not entitled to judgment in this case against the Nez Percé tribe of Indians, because the Indians committing the depredation were members of Joseph's band of non treaty Nez Percés, and were not in amity with the United States at the time of the commission thereof, and, further, because when claimants' property was destroyed a state of actual war existed between the band of Indians causing such destruction and the United States.

Claimants are not entitled in this case to recover for any property not shown to have been taken or destroyed, and which at the time belonged to Stone and Rouse as copartners.

Claimants' evidence as to value of property taken and which was partnership property does not show its value to exceed the sum of \$3,000.

Claimants' petition should be dismissed because the Court of Claims has no jurisdiction to render judgment therein, the defendant Indians not being in amity with the United States Government at the time of the commission of the depredation complained of.

L. W. COLBY,  
*Assistant Attorney-General.*

R. N. STEVENS,  
*Assistant Attorney.*

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